Supreme Court, U.S.
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No. 96-1279

In the Supreme Court of the United States

OCTOBER TERM, 1996

GEORGE G. ROGERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a district court's failure to instruct the jury on an element of an offense is harmless error where, at trial, the defendant admitted that element.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 94 F.3d 1519.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 1996. A petition for rehearing was denied on January 6, 1997 (Pet. App. 18a-19a). The petition for a writ of certiorari was filed on February 12, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of knowingly possessing a

machinegun, in violation of 18 U.S.C. 922(*o*); one count of knowingly possessing a silencer not registered in the National Firearms Registration and Transfer Record, in violation of 26 U.S.C. 5861(d); and one count of knowingly possessing a silencer that lacked a serial number, in violation of 26 U.S.C. 5861(i). He was sentenced to 33 months' imprisonment, to be followed by three years' supervised release. The court of appeals reversed petitioner's conviction for possessing a machinegun. The court affirmed petitioner's other convictions. Pet. App. 1a-17a.

1. On March 15, 1991, petitioner was arrested for drunk driving. Gov't C.A. Br. 2-3. The arresting officer searched petitioner's truck and discovered several firearms, including a MAC-11 pistol, a silencer, a flash suppressor, and ammunition. Later investigation showed that the MAC-11 had been modified to function as a machinegun, and that the silencer did not have a serial number and had not been registered in the National Firearms Registration and Transfer Record. Pet. App. 2a-3a. Petitioner denied that he owned the MAC-11 or the silencer, but he did identify the two items with confidence and precision. *Id.* at 3a-5a & n.2.

2. Under 26 U.S.C. 5861, it is illegal to possess unregistered or unserialized items that, like silencers, fall within the definition of "firearm" contained in 26 U.S.C. 5845(a). At trial, the district court instructed the jury that, to convict petitioner under Section 5861, it had to find, among other things, that he "knowingly possessed a 'firearm,' as defined [in Section 5845]." Gov't C.A. Br. 8. The court did not clearly instruct the jury that, to convict, it had to find that petitioner specifically knew that the item in his possession was a silencer or that it had the

characteristics that subject it to regulation under Section 5845.[1] Petitioner objected that the instruc-

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[1] With respect to the count charging petitioner with possessing an unregistered "firearm," in violation of 26 U.S.C. 5861(d), the court instructed:

> Count II: Title 26, U.S. Code, Section 5861(d), makes it a Federal crime or offense for anyone to possess certain kinds of firearms which are not registered to them in the National Firearms Registration and Transfer Record.
>
> Title 26, U.S. Code, Section 5845, defines "firearm" as including a silencer.
>
> The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:
>
> First: That the Defendant knowingly possessed a "firearm," as defined above;
>
> Second: That the "firearm" was not then registered to the Defendant in the National Firearms Registration and Transfer Record.
>
> It is not necessary for the Government to prove the Defendant knew that the item described in the indictment was a "firearm" which the law requires to be registered.
>
> Let me just stop here right now and look up, folks. That doesn't mean the ordinary pistol, shotgun, rifle that anybody can buy. It's just the certain ones that—It's confusing because we use the term "firearm" for that same thing that's so very lawful. It's just these certain things that are defined that have to be registered in the National Firearms Registration and Transfer Record.
>
> What must be proved beyond a reasonable doubt is that the Defendant knowingly possessed the item as charged, that such item was a "firearm" as defined

tions should have required the government to prove that he specifically "'knew th[e] items in question were firearms' under the National Firearms Act." Pet. App. 6a.

3. In *Staples* v. *United States*, 511 U.S. 600 (1994), this Court held that, to obtain a conviction under Section 5861(d), the government must prove that the defendant "knew of the features of his [firearm] that brought it within the scope of the Act." 511 U.S. at 619. On appeal, petitioner relied on *Staples* to argue that his convictions on all three counts were invalid. The government conceded that *Staples* required reversal of petitioner's conviction for possession of a machinegun under Section 922(*o*), because the evidence at trial had not proven that petitioner knew that the MAC-11 had been modified to act as a fully automatic weapon. The court of appeals agreed and reversed petitioner's conviction on that count. Pet. App. 7a-8a.

Petitioner also argued that *Staples* required reversal on the other two counts because the court had not instructed the jury that, to convict on those counts, it had to find that petitioner had known that the silencer in his possession was, in fact, a silencer. The court of appeals agreed with petitioner that the district court's instruction on that point was erroneous under

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above, and that is was not then registered to the Defendant in the National Firearms Registration and Transfer Record.

Gov't C.A. Br. 8. The court issued a similar instruction with respect to the count charging petitioner with possessing a "firearm" without a serial number, in violation of 26 U.S.C. 5861(i). Gov't C.A. Br. at 8-9.

Staples. Pet. App. 8a.[2] The court held, however, that the error was harmless because the instructional "omission" at issue "related to an element of the crime that the defendant * * * admitted." Pet. App. 14a (citing *Carella* v. *United States*, 491 U.S. 263, 270-271 (1989) (Scalia, J., concurring)); see *id.* at 16a. The court noted that, at trial, petitioner "emphatically and without reservation admitted that he knew the item found in his truck was a silencer," a concession reaffirmed by his "attorney during closing argument." *Id.* at 16a; see also *id.* at 16a n.14. As a result, the court held that the guilty verdict was unattributable to the instructional error and was, therefore, harmless beyond a reasonable doubt. *Id.* at 17a.

DISCUSSION

Petitioner contends (Pet. 10-25) that the court of appeals' application of harmless-error analysis to the instructional error in this case was wrong and inconsistent with decisions of other courts of appeals. There is apparent disagreement among the courts of appeals on the availability of harmless-error review when an instructional error removes an element of an offense from a jury's consideration. Nonetheless, petitioner cites no conflict—and we are aware of none—on the narrow issue decided by the court of appeals in this case: whether an instructional error may be found harmless in the "rare situation[]," presented here, in which the error related to "an element of the crime that the defendant * * * admitted." *Carella* v. *United States*, 491 U.S. 263, 270-271 (1989) (Scalia, J., concurring) (citing *Connecticut* v. *John-*

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[2] Noting that *Staples* dealt only with Section 5861(d), the court of appeals assumed, without deciding the issue, that the same analysis would apply to Section 5861(i).

son, 460 U.S. 73, 87 (1983) (plurality opinion)). The court of appeals' judgment rests on its conclusion that, in view of petitioner's "unequivocal assertions" (Pet. App. 16a) of knowledge that he possessed a silencer, the instructional error "did not contribute to the verdict obtained." *Ibid.* (quoting *Chapman* v. *California*, 386 U.S. 18, 24 (1967)). That conclusion was correct, and petitioner's discussion of purported conflicts on other harmless-error points is not properly presented here.

This Court may nevertheless wish to hold the petition pending its decision in *Johnson* v. *United States*, No. 96-203 (argued Feb. 25, 1997), which also involves an issue concerning the availability of appellate relief when an instruction erroneously withholds an element from the jury's consideration. As petitioner correctly observes (Pet. 16 n.7), our contention in *Johnson* is that the forfeited instructional error at issue there is properly addressed under the plain-error standard of Rule 52(b) rather than under the harmless-error standard applicable here. Nonetheless, the petitioner in *Johnson* argues that, on the facts of that case, her failure to object did not subject her to the more rigorous plain-error standard and that, in any event, an instructional omission always requires reversal under either harmless- or plain-error review. See, *e.g.*, Brief for Petitioner at 31 in *Johnson*, *supra* ("an error such as that presented in this case is not amenable to analysis under Rule 52(a) or (b)"). This Court's resolution of *Johnson* could, therefore, bear on the proper disposition of this case.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Johnson* v. *United States*, No. 96-203, and then disposed of accordingly.

Respectfully submitted.

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